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94-1490

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JACK KEVORKIAN,
PETITIONER

vs.

THE PEOPLE OF THE STATE OF MICHIGAN
RESPONDENT

ON CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

IS THERE IS A DUE PROCESS RIGHT TO COMMIT SUICIDE, ATTEMPT SUICIDE, OR ASSIST IN A SUICIDE, THOUGH THE CONSTITUTION HAS NOTHING TO SAY ABOUT THE SUBJECT?

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was charged with the criminal offense of assisting in a suicide under MCL 752.1027; MSA 28.547(127). After he was bound over for trial, the trial judge dismissed on motion, finding the statute unconstitutional as a violation of the rights of the petitioner to substantive due process under the United States Constitution. The Michigan Court of

Appeals affirmed the dismissal, but found dismissal mandated by a technical violation of the Michigan Constitution (the "title/object" clause) in the manner in which the statute was passed, rejecting the due process claim.

Subsequently, on December 13, 1994, the Michigan Supreme Court reversed the Michigan Court of Appeals, holding that there is neither a title-object difficulty under the Michigan Constitution with the manner in which the statute was passed, nor a due process right to assisted suicide. Petitioner now seeks certiorari from this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

Respondent will not equivocate with regard to the issue here presented; whether State Legislatures are precluded from prohibiting assisting in a suicide by something in the Constitution is an issue of major national jurisprudential significance. However, certiorari should be denied because the Michigan Supreme Court correctly decided the question; the State of Michigan would also note that there is a question regarding whether the Petitioner presents to this Court a final judgment for this Court's review.

A. The Final Judgment Question

There is no question that the legal question in this case has been finally decided by the Michigan Supreme Court: that court held that there is no due process right to assisted suicide, and this is the

law in Michigan, and applicable to this case. However, this ruling arose from a prosecution appeal from the dismissal of the criminal prosecution on defense motion, and no trial has yet been held. It is clear that should the petitioner be convicted, the Michigan Supreme Court ruling is the law of the case on any subsequent appeal, and the issue would be resolved the same way on that basis. However, that there is a trial remaining does raise a question as to whether a final judgment is presented under 28 USC 1257.

The statute confers jurisdiction with respect to "final judgments...rendered by the highest court of a State in which a decision could be had." This Court stated in Department of Banking v Pink, 317 US 264 (1942) that the test is whether the record shows that "the order of the appellate court has in fact fully

adjudicated rights and that the adjudication is not subject to further review by a state court." Here, the legal question has been fully adjudicated, but further proceedings remain in the state court system on the case. This Court must decide as a threshold matter whether the judgment is final for purposes of 28 USC 1257.

On the other hand, this court has given the finality requirement a "practical rather than a technical construction." Cohen v Beneficial Loan, 337 US 541, 546 (1949). There are situations where a practical construction of the statute has led the Court to consider a ruling final even though there are further proceedings in the lower court yet to be undertaken. Cox Broadcasting v Cohn, 420 US 469 (1975). The category of case under Cox within which the instant case might fall is that it might be viewed as a case "where the federal issue

has been finally decided in the state courts with further proceedings pending in which the party seeking review...might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." Here, the case might be decided on nonfederal grounds (petitioner might be acquitted at trial), where reversal of the Michigan Supreme Court on the due process issue presented by petitioner would in fact be "preclusive of any further litigation" by causing dismissal of the prosecution, if there is a due process right to suicide. It thus may well be that this case falls within

Cox, but respondent believes it appropriate to call the question to the Court's attention.

B. The Question On The Merits

(1) The Framework of Review

The question regarding which Petitioner seeks review is whether the Michigan Supreme Court properly held that whether assisting in a suicide is to be prohibited is a question for the political branches of government. Respondent submits that it did.

The starting point for all analysis of the constitutionality of a statute is that the constitutionality of the law in question "is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so." Thomas Cooley,

Constitutional Limitations, at 183. See also People v Collins, 3 Mich 343, 349, 405 (1854); People v Gansley, 191 Mich 347 (1917) ("courts in a long series of cases have enunciated the principle that the presumption is in favor of the constitutionality of a statute"). This may seem a commonplace, but, as Justice Cooley observed elsewhere in his treatise regarding another maxim of construction, while it may "seem so obvious a truism that one expects to see it universally accepted without question" nonetheless it "frequently becomes necessary to re-declare this fundamental maxim." Cooley, at 59.

Because of this presumption of constitutionality, and also because resolution of a challenge to the constitutionality of a statute is "one of the most grave and delicate duties which a judicial tribunal can be called upon to

perform," Collins, at 347, Cooley, at 182, Justice Cooley wrote that "when courts are called upon to pronounce the invalidity of an act of legislation...they will approach the question with great caution...and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.....'It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt.'" Cooley, at 182-183, quoting Ogden v Saunders, 12 Wheat 270 (1827). See People v Stambosva, 210 Mich 436, 441 (1920) (the rule is that "every intendment is to be taken in favor of the

propriety and validity of legislative action, and that in case of doubt courts should not interfere to thwart the legislative will").

Of course, it is also a truism that a court may not invalidate a statute because the court believes it "unjust and oppressive," or because "it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed by the constitution." Cooley, at 164. This is so because in exercising the authority to declare a statute unconstitutional judges are not claiming judicial supremacy; rather, "they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the

constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." Cooley, at 160 (emphasis added).

In examining the constitutionality of a statute, the meaning of the constitutional provision against which the statute is to be measured is obviously of critical importance. The foremost maxim of construction is that "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley, at 55 (emphasis in the original). This method of construction is a part of our jurisprudential history. The court is to "declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it

is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, at 55. As Justice Campbell put it in People v Blodgett, 13 Mich 127, 138 (1865): "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them." See also Justice Scalia, concurring in Minnesota v Dickerson, 124 L Ed 2d 334, at 348 (1993): it is a "fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning

ascribed to them at the time of their ratification." This does not mean that the constitution is "static" in that it cannot be applied to unforeseen events or developments--surely, its principles can be applied to new situations, as Justice Campbell recognized over 125 years ago: "That the constitution means nothing now that it did not mean when it was adopted, Iregard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances." Blodgett, at 140 (emphasis added). But the principles do not change--the constitution does not change to meet the times--the constitution is simply capable of application to new circumstances.

(2) The Due Process Question

> "...there is simply no avoiding the fact that the word which follows "due" is "process"....we apparently need periodic reminding that 'substantive due process' is a contradiction in

terms--sort of like 'green pastel redness.'"[1]

John Hart Ely, Democracy and Distrust (Harvard University Press, 1980), p.18.

The opinion of the trial judge in this case, ultimately reversed by the Michigan Supreme Court, starkly reveals the dangers of adjudication by preferring a particular moral philosophy. The trial judge, in inventing a due process right to assisted suicide, rejected the notion that the history and tradition of the Nation provide the standard, for, said the trial judge, that would "not permit (the constitution" to be (a) living (and) dynamic document...." (that is, would not allow it to be amended

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[1] See also Justice Scalia, concurring in United States v Carlton, __US__, __LEd 2d __, __S Ct__ (62 LW 4472, 4476 (6-13-94): "If I thought that that "substantive due process" were a constitutional right rather than an oxymoron...."

other than by actually being amended), the court relying heavily on the case of Planned Parenthood v Casey, 505 US___, 120 L Ed 2d 674 (1992), citing the "joint opinion" of three justices. The court found instead that history and tradition "has its uses," but that there is a second and separate (though related) component to the due process inquiry, and that is to consider whether the claimed right is "implicit in the concept of ordered liberty.". The concept of "ordered liberty," held the court, is by definition an inquiry into the "contemporary collective conscience." Thus, the court viewed the constitutional inquiry as an examination of history and tradition, coupled with an examination of the "contemporary collective conscience," which it substituted for the concept of "ordered liberty."

The trial judge not only translated "ordered liberty" into "collective contemporary community conscience," a translation which cannot be defended, but also transmorgified the analysis of our Nation's history and tradition into an analysis of the "moral or legal history and tradition" not only of this Nation, but of "western society" in general. Finding no support in the history and tradition of this Nation for assisted suicide, the trial judged turned to "Greek and Roman" practices as providing "significant support" that historical attitudes toward suicide in those societies were more "generous" than those found in our history. The court thus spent some time discussing Greek and Roman practices, as well as alleged early Christian practices, none of which has the slightest thing to do with what "liberty" was understood to mean in the history and

tradition of our Nation at the time of the ratification of the Constitution of the United States, and at the time of the ratification of the 14th Amendment, a history and tradition which is, in fact, quite clear.

The court then reached a truly remarkable conclusion: after finding that this country has a strong tradition and history against suicide, but that Greek and Roman history were more generous, the court concluded that "The foregoing review of our Country's history and tradition does not reflect an equivocal result, but one that is murky." This is completely untrue--the history of our Nation, even as expounded by the trial judge, is absolutely clear; it cannot be made "murky" by looking to the history and tradition of other nations! To say, as did the trial judge, that "there is significant support in our traditions and

history for the view approving suicide" (emphasis added) is simply flatly false; to say, as did the trial judge, that "it may be that the view which proscribes suicide or attempted suicide currently predominates" is to say that even under the trial judge's "contemporary community conscience" standard (which cannot be found in the Constitution) the statute must be constitutional. The Michigan Supreme Court properly rejected this form of "jurisprudence."

The Analytical Approach

> "Well, what may seem like the truth to you," said the seventeen-year-old bus driver and part-time philosopher, "may not, of course, seem like the truth to the other fella, you know."
>
> **"THEN THE OTHER FELLOW IS WRONG, IDIOT!"**
>
> Philip Roth, The Great American Novel (1973), p.19.
>
> "...it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon

> conceptions of morality with which they disagree....Otherwise a constitution...would be become the partisan of a particular set of ethical or economical opinions, which by no means are held semper ubique et ab omnibus.
>
> Otis v Parker, 187 US 606, 47 L Ed 326 (1902) (Justice Holmes, for the Court)

The attack on the prohibition on assisted suicide generally proceeds by a series of logical progressions, essentially as follows: 1)the Constitution prohibits deprivation by the Government of an individual's life, liberty, or property without Due Process of law; 2)a concept of "personal autonomy" may be located within the "liberty" protected by the Constitution; 3)that concept of personal autonomy includes a person's ability to control his or her own body--to make "basic decisions regarding bodily integrity"; 4)that ability to control one's own body and make basic decisions regarding bodily integrity includes the

liberty to terminate one's life; 4) a prohibition on the liberty interest of self-destruction is therefore unconstitutional (rather than subject to deprivation only upon "Due Process"). It is more than passing strange that under the Due Process Clause one's very life may be taken by the Government, certainly against his or her will, so long as fair procedures are employed, but an alleged aspect of one's right to liberty may not, no matter what the procedure. How can this be? From where does this liberty interest arise that is superior to one's right to live?

One thing is clear: an "undeprivable even with Due Process" right to liberty/personal autonomy/control of one's body/to commit suicide (and to assist someone in so doing) can be found neither in the text of the Constitution, nor in the history of our Nation. It comes, rather

from the belief of those who think it the right, or correct, or moral thing, and must be "constitutionalized" by them to protect it against those to whom it "may not, of course, seem like the truth," because those people, even if they happen to include the democratically elected lawmakers of the society, are simply **wrong**.

This approach, of course, allowed Chief Justice Taney to declare that there could be no valid law against slaveholding in the United States, slaveholders having a liberty (as well as property) interest in owning slaves with which the Government could not interfere. How did Chief Justice Taney know this liberty interest existed, it not being stated in the Constitution? He knew it because he was passionately convinced that it **must** be so. Dred Scott was not decided on the basis of history and tradition giving rise to a liberty interest in slave holding,

as history and tradition would not support such a finding, slavery being prohibited in much of the country. It was the prevention of action by the democratically elected legislature--a ursupation of authority by the judiciary--by proclaiming that the legislature was without power to ban slavery in the territories through the finding of a liberty interest in the slave holder which helped precipitate the Civil War. Dred Scott was decided on Petitioner's theory of constitutional adjudication; that is, that the Constitution is an empty vessel into which the judiciary may pour whatever meaning it chooses, the object of the parties to constitutional disputes being to convince the court as to which side has the better moral philosophy.

Petitioner offers no principle by which the statute could be overturned which would in any way serve as a check on the personal

predilections of the judiciary. In short, the approach of the petitioner is simply moral philosophy, attempting to engraft a particular moral philosophy into the Constitution, and as Professor Ely has said, "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." Because history and tradition demonstrate that there is no constitutional right to assisted suicide does not <u>disable</u> the legislature from deciding to <u>allow</u> the practice. It is a finding of <u>unconstitutionality</u> which freezes tradition and history, which ends debate on the matter, not a finding of constitutionality, which allows the democratic process to continue to work.

The Constitution not properly being a flag to be captured by whomever can persuade a majority of Justices as to their view of moral philosophy, thereby completely shutting out competing views, what approach is to be taken as a matter of law and not philosophy to identification of liberty interests? Palko v Connecticut, 302 US 319, 82 L Ed 288 (1937) demonstrates the method.

Today, the doctrine of "selective incorporation" of the Bill of Rights has captured the field as to most of the rights protected by the Bill of Rights, so that it is held that the "Due Process" required by the 14th Amendment of the States includes most of the Bill of Rights. But before selective incorporation there was Palko, and the approach of Palko is still valid with regard to claims of liberty interests or procedural protections not contained within

the Bill of Rights. In that case the defendant was found guilty of murder in the second degree after a trial for first degree murder, and the state appealed, as was allowed under Connecticut law. On appeal it was found that error had been committed in excluding the defendant's confession, in excluding testimony to impeach his credibility, and in instructing the jury on the difference between first and second degree murder. Palko was retried, convicted of first degree murder, and sentenced to death. He claimed that jeopardy precluded the retrial which he had not sought.

Because the Bill of Rights, and therefore the jeopardy provision, was not (then) applicable to the States, the Court looked to the Due Process Clause of the 14th Amendment to see if the practice of Government appeal and retrial offended that clause. The Court stated that those

protections which may be found to be "implicit in the concept of ordered liberty" are applicable to the States through Due Process requirements. A liberty interest or procedural protection exists if "so rooted in the traditions and conscience of our people as to be ranked fundamental." In the case before it the Court concluded that because the state was not "attempting to wear the accused out by a multitude of cases with accumulated trials," but instead asking only that "the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error," this was not "cruelty at all"; indeed, to allow the state an appeal with regard to trial error was, said the court, "no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." 82 L Ed at 293-294.

As stated, the total incorporation/selective incorporation/no incorporation struggle with regard to the Bill of Rights has ended with the victory of selective incorporation, but for claims outside the Bill of Rights the Palko approach remains viable. Michael H. v Gerald D., 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333 (1989) illustrates the point. The petitioner maintained an adulterous relationship with a married woman who was cohabiting with her husband, and a child was born, which was almost certainly his. The mother reconciled to her husband, and state law conclusively presumed that the issue of a wife cohabiting with her husband, who was not impotent or sterile, was the child of the marriage. The purpose of the statute was to protect the privacy and integrity of the family; the petitioner, however, wished to establish visitation rights with the

child, which he could only do by establishing paternity, which the law precluded. He claimed that the state statute was unconstitutional because he had a liberty interest in his relationship with his child.

The Court rejected the claim. The plurality opinion observed that the Court itself had previously expressed concern regarding the recognition of "new" liberty interests under Due Process claims, "lest the only limits to...judicial intervention become the predilections of those who happen at the time to be Members of this Court." Moore v East Cleveland, 431 US 494, 52 L Ed 2d 531, 97 S Ct 1932 (1977). As Justice White observed in dissent in Moore, "the present construction of the Due Process clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers..., the Court should be

extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."

The approach cannot be one of personal predilection then, said the Court, so that "we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental'...but also that it be **an interest traditionally protected by our society**," that it be "rooted in history and tradition." (emphasis supplied, 105 L Ed 2d at 105). Finding that the relation between persons in the situation of the petitioner and his child had not been protected under our historic practices (indeed, the historic tradition is the other way, to protect the

integrity and privacy of the family), th
Court rejected the claimed liberty interest
See also Bowers v Hardwick, 478 US 186, 92
Ed 2d 140, 106 S Ct 2841 (1986).

Moore v East Cleveland, cited above
itself also demonstrates the appropriat
method. A housing ordinance limite
occupancy of dwellings to members of
single family, and defined "family" a
essentially only the "nuclear" family.
woman was convicted of violating th
ordinance because she lived with her son an
two grandsons, and the grandsons were no
brothers but cousins. In dissent from th
finding of unconstitutionality of th
ordinance, Justice White expressed th
concerns above noted regarding judicia
usurpation of legislative authority unde
the auspices of the Due Process Clause
based on nothing other than th
predilections of the Justices. Justic

Powell, the author of the lead opinion, also appreciated this concern, agreeing that "there <u>are</u> risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights....there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court....history counsels caution and restraint." How, then, to avoid decisions based only on a particular moral philosophy embraced by a majority of Justices? Justice Powell supplied the answer: "Appropriate limits on substantive due process come...from careful 'respect for the teachings of history (and) solid respect for the basic values that underlie our society.'" 52 L Ed 2d at 540. Addressing Justice White's dissent directly, Justice

Powell stated that defining the substantive content of liberty interests to be found in the Due Process Clause by looking to "history and tradition" imposes "meaningful limits" on the judiciary. 52 L Ed 2d at 540, fn 12 (emphasis added). While reasonable people may at times disagree as to what history and tradition demonstrate, at least they are engaged in the same enterprise, and where history and tradition point in a certain direction, judges are not free to disregard it in favor of their own views of moral philosophy or ethical values.

Cruzan v Director, Missouri Department of Health,, 497 US 261, 111 L Ed 2d 224, 110 S Ct 2841 (1990) in no way justifies the trial court's usurpation of legislative authority; indeed, read properly, it virtually compels the opposite conclusion. The claimed liberty interest there was a right to refuse life-sustaining

medical intervention, and more precisely, whether the decision of the State that it must be demonstrated by convincing evidence that the individual who is being treated would desire the cessation of treatment was constitutional. The Court looked again to history and tradition. It is in our tradition that the touching of another person, including through medical treatment, without permission, or "informed consent," is a battery, which can lead to damages. As the Court observed, the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." 111 L Ed 2d at 236. The Court specifically declined to view the matter as involving a generalized constitutional right of privacy, analyzing the question instead in terms of a liberty interest to avoid unwanted touching or intervention upon one's

body, and looking to history and tradition. The Court concluded in the end that this liberty interest can be regulated by the State with process that is "due," and held that requiring a showing of convincing evidence was not improper, or "undue." On its way to this conclusion the Court discussed the State's interest in the matter, noting in support of the State's interest that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." 111 L Ed 2d at 243. How possibly could the Court have looked to the fact that the majority of states have laws imposing criminal penalties for assisted suicide as a factor in favor of the State's interest on the issue of terminating medical care if those state laws are in fact unconstitutional? Cruzan provides no support for the trial court's unheard of

procedure, but mandates the conclusion that the trial court erred egregiously, and supports the opinion of the Court of Appeals.

The Casey Decision

Petitioner relies most heavily on the triune joint opinion in Planned Parenthood v Casey, 120 L Ed 2d 674 (1992). The decision, however, plays them false. Casey, albeit in a way previously unknown in jurisprudence, "retained" the "essential holding of Roe v Wade...." (retained in a way previously unknown in jurisprudence in that the joint opinion also modified the "essential" holding of Roe v Wade, see Justice Scalia, dissenting, at 120 L Ed 2d at 791: "I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version" of stare decisis). The opinion threw out the trimester approach of Roe in

favor of a viability approach; that is, it held that the State may absolutely prohibit abortions, save when necessary to save the life or health of the mother, after fetal viability. Thus, once the fetus has attained the degree of development that the Court is willing to recognize as "life," the interest of the State in protecting life outweighs the interest of personal autonomy, so that the State may prevent the abortion. See 120 L Ed 2d at 710. Even before viability, the State's "profound interest" in what the opinion called "potential life" allows regulation, so long as an undue burden is not placed on the decision to obtain an abortion, an "undue burden" being a provision of law the purpose of effect of which is to place a "substantial obstacle" in the path of a woman seeking an abortion "before the fetus attains viability." 120 L Ed 2d at 715. At viability, however, the

State's interest overtakes the individual liberty interest created in Roe, and nontherapeutic abortions may be prohibited.

This does not advance the petitioner's cause, for even abortion law, then, recognizes an overwhelming State interest in protecting life that has reached that form which the Court is willing to recognize, which, in the case of a fetus, is viability, that state of development where the fetus could survive outside the womb. If the State's "profound interest" in protecting life overtakes the right of liberty created in Roe, how can it possibly be said that it ends at some point after birth? The interest of the State is surely at least as profound after birth as at viability, as history teaches. The only possible answer of the petitioner is that life may reach a point where it should not be considered life--it should be defined "out of"

life--for it has become "not worth living." But this question of moral philosophy is one to be debated before legislatures, not one for the imposition of a particular answer by judges, and history teaches that the concept of a life not worthy to be lived is a dangerous notion indeed. Casey supplies no succor to petitioner:

Tradition and Assisted Suicide

Do, then, our traditions and our history recognize a right to suicide, and to assist another in its commission (leaving aside whatever the history and traditions of other nations, such as Greece and Rome, reveal)? Clearly not. In England, suicide was a form of common law murder, described as either self-murder, see 3 Coke, Institutes Of The Laws of England 54 (1797), 4 Blackstone, Commentaries 189, or the decedent being deemed "the murderer of himself." W Clark and W Marshall, A

Treatise On The Law of Crimes, sec. 10.03, at 623 (7th Ed, 1967). It was punishable by burial in the highway with a stake through the suicide's body and forfeiture of all his goods to the crown. According to Blackstone, common law felonious homicide occurred "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." Blackstone specifically stated that murder may be "either by killing one's self, or another man." 4 Blackstone, Commentaries, 188, 195.

Suicide is no longer considered criminal, but not because the act does not fall within the definition of murder, but because no punishment is provided for self-murder. Forfeiture of all property and burial in the highway with a stake through the suicide's body is no longer considered

appropriate. This change was accomplished not to legitimize the act of suicide, but to spare the family of the suicide. See e.g. Kamisar, "Are Laws Against Assisted Suicide Unconstitutional," Hastings Center Report 23, no. 3, p.32 (1993). However, aiding a suicide still falls within the common law definition of murder, and, where there is no other specific offense for the crime of assisted suicide, is therefore punishable according to the ordinary statutory penalties. The position of the dissent, that because "neither suicide nor attempted suicide is a crime in this state or in any other state..." that it is therefore "logically incomprehensible that a person can be charged with a capital crime of aiding and abetting a lawful act," 205 Mich App at 192, not only simply ignores binding precedent (Roberts), but may well have been expressed nowhere else in a judicial

opinion, as Professor LaFave has derided the view that because suicide is no longer punished assisted suicide is also not criminal (the view taken by the dissent in this case) as "**most certainly unsound**." 2 LaFave and Scott, Substantive Criminal Law, sec. 7.8(c), at 249 (1986). The most celebrated model code with regard to criminal law, the Model Penal Code, not only prohibits assisted suicide in sec. 210.5, but grants a privilege to those who use force to prevent a suicide. See sec. 3.07(5). The Code was drafted after years of study, by the most eminent criminal law scholars, and itself is proof that there has not existed a historically recognized right to commit suicide or to assist in a suicide. See Kamisar, at 33.

Moreover, at the time of the ratification of 14th Amendment 21 of the 37 existing states, and 18 of the 30 ratifying

states, prohibited assisted suicide. And even those states which had not spoken to the issue in 1868 held that assisted suicide was unlawful when the issue was faced. See Marzen, O'Dowd, Crone, and Balch, "Suicide: A Constitutional Right?," 24 Duquesne L Rev 1, 76-100, 148-242 (1985). It can readily be said that there is no significant support whatever for any claim that a right to suicide, or to assist in suicide, is "so rooted in our tradition that it may be deemed fundamental or implicit in the concept of ordered liberty."

There is not in this country, then, a tradition protecting suicide or assisted suicide. The Michigan Supreme Court properly left the question to the Michigan Legislature. Petitioner's view would arrogate the authority of "We the People" unto the judiciary, to make decisions the

judiciary is singularly unqualified to make.[2] The Michigan Supreme Court rightly recognized this.

(3) Conclusion

> "It is precisely historical practices that define what is 'due.' 'Fundamental fairness' analysis may appropriately be applied to departures from traditional American conceptions of due process; **but when judges test their individual notions of 'fairness' against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges."**

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[2] See Alexander Bickel, The Supreme Court and The Idea Of Progress (Yale University Press: 1978), p. 84: "The independence of the judges is an absolute requirement if individual justice is to be done....But supreme judicial autonomy, the judge answerable only to his own conscience in making policy for the society, in adjusting, conformably to one or another choice of values, the conflicting interests, desires, and ethical and moral aspirations and preferences of the groups that constitute the society--that is something else again...."

Justice Scalia, concurring in Schad v Arizona, 115 L Ed 2d 555 (1991)

The claim that assisted suicide is protected by the Due Process Clause fails as a matter of history and tradition, and fails in its attempt to broadly state the right as a right of "personal autonomy," which does not exist. There are particular rights of personal autonomy, such as the right not to be seized under the Fourth Amendment absent probable cause or reasonable suspicion, but a general right to personal autonomy is a right to be free of all law. The line-drawing Petitioner would require here is classic judicial legislation. If there is a right of personal autonomy which includes a right to self-destruction, how can it possibly be limited? Why would not a person simply tired of life have a right to "blow his brains out" or drown him or herself without interference by the state?

And if there is a right of personal autonomy, which includes the right to control one's own body and make basic decisions regarding bodily integrity, why does it not include a right of consenting adults to engage in acts of incest? Why does it not include the right of a competent minor to engage in sex with an adult (how can statutory rape exist as a crime where the act is consensual?). Why does it not include the right to polygamous marriages? Why does it not include the right to take psychotropic drugs for recreational purposes? Why can an individual who causes harm to him or herself be committed to an institution as a threat to him or herself?

The "right" which the Petitioner would have the judiciary invent is rife with line-drawing impossibilities. Could it possibly be plainer that if "in matters that relate solely to ourselves, we alone are

free to decide our personal fate," as stated by the dissenting judge in the Michigan Court of Appeals, then a right to suicide must include all of "us"--it cannot be said that it does not extend to those that are suffering physical pain but are not terminally ill, that it does not extend to those that are suffering "psychic" pain but are not physically ill at all, that it does not extend to anyone for any reason whatsoever. Further, any attempt at linedrawing necessarily involves the government in determining whether a life is "worthy to be lived." If the right is invented and limited to the terminally ill, when does it come into being? We are terminal from the moment of conception; when a specific illness has overtaken us, so that our death is reasonably predictable, does the "right" exist 3 months from death, 6 months from death, one year from death, five

years from death? Does it not exist for those who are terminally ill, but who are not suffering great pain, and who determines whether pain is being suffering, and its degree? If the "right" belongs only to the terminally ill who are suffering, but whatever standard, how can it be denied to those who are suffering "psychic" pain. How can a court possibly arrogate to itself the right to tell these people that though "The power to determine the limits to which one can endure pain and agony is certainly intrinsic to this basic concept of personal autonomy," it does not belong to <u>them</u>, so that rather than being treated (as many are, to full recovery) they should simply be assisted in achieving their deaths. As Professor Kamisar has observed, "if a competent person comes to the unhappy conclusion that his existence is unbearable and freely, clearly, and repeatedly requests

assisted suicide, why should he be rebuffed because he does not 'qualify' under somebody else's standards? Isn't <u>this</u> an arbitrary limitation of self-determination and personal autonomy? 'How,' asks Daniel Callahan, 'can self-determination have any limits? Why are not the person's desires or motives, whatever they be, sufficient?'" Kamisar, at 37. The People have simply not spoken on this question through the Constitution, and thus it is for the legislature.

Moreover the concern, expressed by Professor Kamisar, that "In a climate in which suicide is the 'rational' thing to do, or at least a 'reasonable' option," that it will "become the unreasonable thing <u>not</u> to do? The noble thing <u>to</u> do?....how likely is it that an old or ill person will be encouraged to spare both herself and her family the agony of a slow decline, even

though she would not have considered suicide on her own?" is certainly legitimate, and may be considered by even "medieval" legislators and scholars, as petitioner has called them, among other epithets. In this vein, Respondent would point out that time and again the enactment of the statute here at issue, and its enforcement by prosecutors, has been compared by petitioner to "Germany in the 1930's and 1940's," it being said that officials there and then also said they were "just following the law." This is bad logic, bad law, and bad history. Atrocities occurred in Germany not because people "followed the law," but because the law broke down; the nation of Germany was ruled by the cult of personality, by one who thought his notions of moral philosophy superior to all others, and who had the military power to put his philosophy into action. Those who committed

atrocities in his name did not "follow the law," they followed orders. It was the suppression of democracy in favor of a "power elite" which was, in its view, above the law, which led to the Holocaust.

An article published in 1949 is also instructive in this regard. The article is "Medical Science Under Dictatorship," 241 New England Journal of Medicine 40 (1949). The article examines the question of how respected men of science--physicians--could have engaged in atrocities under Nazi rule. The article, being published in 1949, has nothing to do with assisted suicide, not being written by a "partisan" of one side or the other of this question of moral philosophy and policy, but being concerned with physician atrocities during the War. The author concluded:

> Whatever proportions these crimes finally assumed, it became evident to all who investigated them that they had started from small beginnings.

> The beginnings at first were merely a subtle shift in emphasis in the basic attitude of the physicians. It started with the acceptance of the attitude, basic in the euthenasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. But it is important to realize that the infinitely small wedged-in lever from which this entire trend of mind received its impetus was the attitude toward the nonrehabilitable sick.

241 N Eng Jrnl of Med at 44 (emphasis added).

As stated earlier, Justice Cooley long ago correctly observed that in exercising the authority to declare a statute unconstitutional judges are "only the administrators of the public will. If an act of the legislature is held void, it is

not because judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." Cooley, at 160 (emphasis added). History clearly teaches us that the people have not expressed their will in the constitution that assisted suicide be protected, and there is thus nothing in the constitution which is paramount to the decision of the people's elected representatives, in our constitutional democracy, to continue to prohibit it.

The "right" sought to be pounded into the Constitution by the petitioner simply cannot be found there, but is one which must be sought in the political arena, there being no principled basis upon which to locate it in the Due Process Clause. It can

only be found there when judges assert their personal and individual predilections as being law. To conclude by reiterating Professor Ely: "...reasoning about ethical issues is not the same as discovering absolute ethical truth...our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles, at least not a set that could plausibly serve to overturn the decisions of our elected representatives." The opinion of the Michigan Supreme Court is correct.

CONCLUSION

Wherefore, the People respectfully request that the certiorari be denied.

Respectfully submitted,

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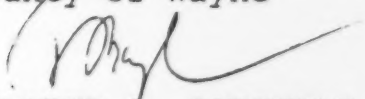

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